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85-1237

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 22, 1986

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Energy Regulatory Commission ("Commission"), in order to promote price competition among pipelines, had the authority to abrogate and proscribe contracts which required the pipelines' customers to purchase minimum volumes of gas.

2. Whether the informal rulemaking procedures followed by the Commission in Order No. 380 were sufficient to satisfy the hearing and substantial evidence requirements of the Natural Gas Act and the due process requirements of the Fifth Amendment.

3. Whether the Commission, having invalidated the purchase provisions under the pipelines' gas sales agreements, acted arbitrarily in refusing to relieve the pipelines from corresponding obligations in their gas purchase agreements.

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PARTIES TO THE PROCEEDING BELOW

Algonquin Gas Transmission Company
Aluminum Association, The
ANR Pipeline Company
Arkansas Louisiana Gas Company
Brooklyn Union Gas Company, The
Cascade Natural Gas Corporation
Chattanooga Gas Company
City Gas Company
Colorado Interstate Gas Company
Columbia Gas Transmission Corporation
Consolidated Gas Supply Corporation
Consolidated Gas Transmission Corporation
Consumers Power Company
El Paso Natural Gas Company
Equitable Gas Company
Foothills Pipe Lines (Yukon) Ltd.
Georgia Industrial Gas Group, The
Great Lakes Gas Transmission Company
Illinois Gas Company
Inter-City Gas Corporation .
Kansas State Corporation
Madison Gas and Electric Company
Michigan Consolidated Gas Company
Michigan Gas Utilities Company
Michigan Public Service Commission, The
Midwestern Gas Transmission Company
MIGC, Inc.
Natural Gas Pipeline Company of America
Northern Illinois Gas Company
Northwest Energy Company on behalf of Northwest Pipeline Corporation and Northwest Central Pipeline Corporation
Northwest Natural Gas Company
Pacific Gas and Electric Company
Pacific Interstate Companies
Pacific Interstate Offshore Company
Pacific Lighting Gas Supply Company
Pacific Offshore Pipeline Company
Pan-Alberta Gas Ltd.
Panhandle Eastern Pipe Line Company

People of the State of California, The
Peoples Gas Light and Coke Company, The
Process Gas Consumers Group, The
Public Service Commission of the State of New York
Public Service Commission of Wisconsin, The
Public Service Electric and Gas Company
Public Utilities Commission of the State of California, The
Southern California Gas Company
State of Michigan, The
Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.
Texas Eastern Transmission Corporation
Texas Gas Transmission Corporation
TransCanada Pipelines Ltd.
Transcontinental Gas Pipe Line Corporation
Transwestern Pipeline Company
Trunkline Gas Company
Washington Gas Light Company
Washington Natural Gas Company
Wisconsin Fuel and Light Company
Wisconsin Gas Company
Wisconsin Gas and Electric Company
Wisconsin Natural Gas Company
Wisconsin Power and Light Company
Wisconsin Public Service Corporation

LIST OF SUBSIDIARIES AND AFFILIATES PURSUANT TO RULE 28.1

Texas Eastern Corporation
Halcon SD Group, Inc., The
Belmont Constructors, Inc.
CDC Exports, Inc.
Halcon Enterprises, Inc.
Scientific Design Company Limited
Scientific Design Constructors, Inc.
Scientific Design Development Company, Inc.
Skyline Oil Company
American Hydrocarbon Company
United States Copper Company
Western Carbon Company
Texas Eastern Oil Company
Texas Eastern Australia, Inc.
Texas Eastern Bawean, Inc.
Texas Eastern Developments, Inc.
Texas Eastern Drilling Systems, Inc.
Texas Eastern Engineering (U.K.) Ltd.
Texas Eastern Finance N.V.
Texas Eastern Guatemala, Inc.
Texas Eastern Indonesia, Inc.
Texas Eastern Netherlands, Inc.
Texas Eastern Orient, Inc.
Texas Eastern Slurry Transport Company
Texas Eastern Sudan, Inc.
Texas Eastern Synfuels, Inc.
Texas Eastern Transmission Corporation
Allegheny Pipeline Company
Fannin Square Corporation
Houston Center Corporation
HCC Dev, Inc.
HCC Sub, Inc.
Texas Eastern LNG, Inc.
Transwestern Coal Gasification Company
Transwestern Colorado Pipeline, Inc.
Transwestern Gas Supply Company
La Gloria Oil and Gas Company
McMurrey Pipe Line Company

TETCO THREE INC.
TETCO FOUR INC. (50%)
TETCO FIVE INC.
TETCO SIX INC.
Texas Eastern (Bermuda) Ltd.
TETCO (Bermuda) One Ltd.
Texas Eastern Arabian Ltd.
Texas Eastern International Petroleum (Bermuda) Ltd.
Texas Eastern Communications, Inc.
Texas Eastern Cryogenics, Inc.
Texas Eastern Engineering, Ltd.
Texas Eastern Exploration Co.
Texas Eastern Hydrocarbon Co.
Texas Eastern Petroleum Co.
Texas Eastern Resources of Canada, Ltd.
Texas Eastern International Services, Ltd.
Texas Eastern New England, Inc.
Texas Eastern Niagara, Inc.
Texas Eastern North Sea, Inc.
Texas Eastern (U.K.) Limited
Texas Eastern Norwegian, Inc.
Texas Eastern Norway A/S
Texas Eastern Nuclear, Inc.
Texas Eastern Pipeline Corporation of New York
Texas Eastern Pipeline Corporation of Pennsylvania
Texas Eastern Shipping Ltd.
Texas Eastern Transport Ltd.
Texas Eastern Terminal Company
Trans-Ohio Pipeline Company
Texas Eastern International Energy, Inc.

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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Texas Eastern Transmission Corporation ("Texas Eastern") respectfully petitions this Court for the issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit upholding a series of orders, identified herein as Order No. 380, issued by the Federal Energy Regulatory Commission ("Commission") that declared unlawful certain minimum bill provisions contained in contracts and tariffs between Texas Eastern and its customers and similar provisions in contracts and tariffs between other pipelines and their distributor customers.

OPINIONS BELOW

The opinion of the court of appeals is reported at 770 F.2d 1144 (1985). The orders of the Commission are reported at III Fed. Energy Guidelines (CCH) ¶¶ 30,571, 30,584, 30,607

(1984).[1] The court's opinion and the Commission orders are reproduced in the Appendix filed by Transwestern Pipeline Company with its Petition for Writ of Certiorari.[2]

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1985. *See* App. at 57. Rehearing was denied on October 25, 1985. *See* App. at 69. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350.

STATUTES INVOLVED

The principal statutory provisions involved are Sections 5(a), 7(b), 7(c), 7(e) and 19(b) of the Natural Gas Act of 1938, 15 U.S.C. §§ 717d(a), 717f(b), (c), (e), 717r(b) (1982), Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982), and § 403 of the Department of Energy Organization Act, 42 U.S.C. § 7173(c) (1982), all of which are printed in the Appendix.

STATEMENT OF THE CASE

Texas Eastern is a natural gas company subject to the Commission's jurisdiction under the Act. It operates a natural gas system which extends from the State of Texas and offshore Louisiana through the Appalachian area to the eastern seaboard of the United States and the Philadelphia area to a point of termination in the New York area. Since its initial operation, which began in 1947, it has provided service to its customers

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[1] These are Order Nos. 380, 380-A, 380-B, 380-C, and 380-D issued in Docket No. RM83-71. They are collectively referred to hereafter in this Petition as "Order No. 380."

[2] Consistent with the practice of this Court and to avoid unnecessary duplication and expense, Texas Eastern adopts as its Appendix the Appendix filed by Transwestern Pipeline Company in Docket No. 85-1219. References herein to the "Appendix" ("App.") will be to the Appendix filed in that docket.

pursuant to a series of privately negotiated contract and tariff arrangements. It serves approximately 90 resale customers under approximately 135 contracts involving in excess of 3,000,000 Mcf of gas per day. All of such contracts are on file with the Commission and have been the subject of Commission review and approval. Certificates of public convenience and necessity have been issued by the Commission under Section 7 of the Act, 15 U.S.C. § 717f, with respect to each of them.

To supply gas in accordance with its contracts and certificates and in specific reliance thereon, Texas Eastern, like other pipeline companies, has entered into long-term gas purchase contracts with producers, which contracts obligated Texas Eastern to take or, if available and not taken, pay for specific quantities of gas. Texas Eastern is a party to more than 900 producer contracts containing take-or-pay provisions. Many of such contracts also contain "minimum take" provisions under which Texas Eastern is required to purchase minimum volumes on a monthly or daily basis.[3] Industry-wide, virtually all producer contracts contain like take-or-pay and/or minimum take provisions.

Texas Eastern's contracts and tariff arrangements with its distributor customers contain "minimum bill" provisions, pursuant to which such customers have agreed to take or pay for certain contracted volumes of gas. In Order No. 380, the Commission invalidated, on an industry-wide basis, all minimum bill arrangements which required the purchasing party to pay for gas not taken. It also invalidated provisions in pipeline contracts and tariffs obligating customers to take specified minimum volumes of gas, "minimum take" provisions, and proscribed the inclusion

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[3] Such contracts also contain force majeure provisions which Texas Eastern contends excuse performance in the event of governmental action such as Order No. 380. Not all of its producers agree, however.

of such minimum bill and minimum take provisions in future contract and tariff arrangements. App. at 123, 268.

The Commission's rationale for the rule was that minimum bill and minimum take provisions serve to restrain competition in the industry and had prevented a decline in gas prices. *See* App. at 21, 80-81.

The Commission's action was taken pursuant to informal rulemaking proceedings under Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). No adjudicatory-type hearings were held. The decision was based on what the Commission and the court below characterized as "legislative facts" which were no more than statements contained in unsworn comments of interested parties seeking relief from their contract obligations. No testing of the comments through cross-examination was permitted. No oral argument was conducted. The operation and competitive effects of specific contracts were not addressed. The decision was made on a generic basis that all minimum bill and minimum take arrangements distorted market forces, compelled the purchase of gas from a particular source where alternative sources of supply might be available at a lower cost, prohibited the distributor companies from pursuing a "least-cost-mix" purchasing policy, and were in sum "anti-competitive" and thus unlawful. App. at 36, 42, 88, 235.[4]

Texas Eastern appealed Order No. 380 to the United States Court of Appeals for the District of Columbia Circuit. The court agreed with the Commission's conclusion that "the elimination of minimum bills will remove barriers to competition" and upheld the Commission's action in abrogating and proscribing such provisions in order "to promote price competition among pipelines." App. at 34, 37. It approved the use of informal rulemaking proceedings primarily on the theory advanced by the

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[4] The Commission also concluded that minimum bill provisions had the potential for the recovery of costs not actually incurred. App. at 82.

Commission that Order No. 380 dealt with "rate issues" and the Commission was authorized to deal with such "rate matters" through informal rulemaking proceedings. App. at 25.

Except with respect to matters not raised by Texas Eastern, the lower court affirmed the Commission.

Motions for rehearing were overruled.

REASONS FOR GRANTING THE WRIT

1. Whether the Commission Can, Contrary to the Policies and Practices of Past Commissions, Restructure the Industry by Abrogating and Prohibiting All Purchase Commitments in Contracts and Tariffs While Purporting To Leave Sales Commitments Intact Is an Important Question Which This Court Should Address.

This case involves very significant matters affecting the entire natural gas industry. The court below characterized Order No. 380 as addressing "the systemic problems of the natural gas market." App. at 52. The Commission itself, in justifying its use of informal rulemaking proceedings, referred to the "pervasive" nature of the issues being addressed. App. at 108. It agreed that the rule would "restructure" the industry. *See* App. at 94.

The service arrangements between pipelines and their distributor customers have since the adoption of the Natural Gas Act in 1938 been predicated upon privately negotiated contractual arrangements. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), *The Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). An integral part of all of such arrangements is the obligation by the pipeline to sell and the corresponding commitment by the distributor company to purchase specified volumes of gas. In reliance on such contractual arrangements, all of which required, before becoming operative, to be reviewed and approved by the Commission under

Section 7 of the Act, pipelines have entered into thousands of contracts with producers and have invested billions of dollars in facilities.

Prior to Order No. 380, the Commission had recognized the essential nature of purchase commitments and had consistently approved minimum bill provisions. *Cf. Columbia LNG Corp.*, 48 FPC 723 (1972), to provide fixed cost recovery in the commodity charge; *Atlantic Seaboard Corp.*, 38 FPC 91, 95 (1967), *aff'd*, 404 F.2d 1268 (D.C. Cir. 1968), to prevent the shifting of costs among customers, *id.; United Gas Pipeline Co.*, 31 FPC 1180, 1201 (1964), *modified*, 32 FPC 687 (1964), *aff'd*, 386 U.S. 237 (1967); *Natural Gas Pipeline Co. of America*, 42 FPC 533, 539 (1969), to prevent swings of magnitudes deleterious to efficient pipeline operation, *id.; United Gas Pipeline Co.*, 31 FPC 1180, 1201 (1964), *aff'd*, 386 U.S. 237 (1967); *Coastal Transmission Corp.*, 26 FPC 318, 333 (1961), to permit financing of the pipeline at terms favorable to the customers; *Transwestern Pipeline Co.*, 22 FPC 391, *modified*, 22 FPC 542 (1959); *Columbia LNG Corp.*, 48 FPC 723, 730 (1972), *modified*, 57 FPC 354 (1977), and to prevent accumulation of excess take-or-pay, *Atlantic Seaboard Corp.*, 38 FPC 91, 95 (1967), *aff'd*, 404 F.2d 1268 (D.C. Cir. 1968); *United Gas Pipeline Co.*, 31 FPC 1180, 1201 (1964), *modified*, 32 FPC 687, *aff'd*, 386 U.S. 237 (1967); *Transwestern Pipeline Co.*, 22 FPC 391, 395, *modified*, 22 FPC 542 (1959).[5]

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[5] Only shortly before its issuance of its Notice of Rulemaking in Docket No. RM83-71, which led to Order No. 380, the Commission had stated that the natural gas industry has been subjected to rigorous cost-based utility regulation and that "monopolistic franchises and legally protected shelter from the icy blasts of competition were the quid-pro-quo that the industry received in return." *Williams Pipe Line Co.*, 21 FERC ¶¶ 61,260, 61,594 (1982), *rev'd. on other grounds sub nom, Farmers Union Central Exchange* v. *FERC*, 734 F.2d 1486 (D.C. Cir.), *cert. denied*, 105 S.Ct. 507 (1984).

By effectively rendering inoperative the take-or-pay provisions in the pipelines' contracts and tariffs with their distributor customers and preventing the pipelines from obligating such customers to purchase any specified volumes of gas, the present Commission, through Order No. 380, has altered significantly the character of the natural gas industry in disregard of the decisions of this Court and the policies and practices of past Commissions since the adoption of the Act. *Cf. United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). The pipelines, including Texas Eastern, remain obligated to sell. Their customers, however, are no longer obligated to take or pay for any specific volumes. Whether the Commission can restructure the industry in this manner is a matter of critical importance.

The consequences are manifest and significant.

First, in introducing its concept of "competition," the Commission, with approval of the court below, overlooks or disregards the decisions of this and other courts with respect to the validity and importance of private contracts and the "stability" which they provide. *Cf. United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956), *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). It introduces an unprecedented concept: that any contract which requires the purchase of a specified volume of gas is *per se* anti-competitive and unlawful.

Second, the ability of the pipeline's distributor customers to contract for future supplies is also impaired in that no pipeline can be expected to commit to sell gas on a long-term, firm basis when there is no corresponding obligation to buy. The fact that competition, unrestrained by contractual provisions, seriously impairs long-term supply stability and causes prices to increase in time of shortage as well as decrease in time of surplus is likewise overlooked or disregarded.

Third, many pipelines, including Texas Eastern, are put in jeopardy under the take-or-pay provisions of producer contracts

which were entered into in reliance on their customers' commitment to purchase.

The Commission erred in Order No. 380. It exceeded its authority in abrogating contracts and proscribing purchase commitments in order, as the court below stated, "to promote price competition among pipelines." App. at 34. The court below erred in approving the Commission's action. Its total prohibition of contract and tariff provisions which prevent purchasers "from shopping for low-cost gas," App. at 36, notwithstanding prior Commission review and approval of such provision, conflicts with fundmental notions of contract sanctity and due process.

2. In Prohibiting Pipelines from Obligating Their Customers To Purchase Specified Volumes of Gas, Order No. 380 Unlawfully Restricts the Ability of the Pipelines To Contract, Contrary to Fundamental Concepts and Decisions of This Court under the Natural Gas Act.

It is well established that the Natural Gas Act permits the relationship between pipelines and their customers to be predicated upon and to be established initially by private "individualized" contractual arrangements and that such contracts are required to justify the substantial investment in facilities required to perform the certificated service and to provide stablility of supply arrangements. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338-39 (1956); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960); *The Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *cf.*, 376 U.S. 651 (1964). In *Mobile*, this Court stated:

> [O]nly a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantual investment in capacity and facilities for the service of a particular distributor. *Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distrubutors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public*

> *interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.*

350 U.S. at 339 (emphasis supplied). The Court further stated:

> By preserving the integrity of contracts, [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry.

350 U.S. at 344.

In *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 154 (1960), this Court stated:

> [T]he scheme of the Act was one which built the regulatory system on a foundation of private contracts.

See also FPC v. *Sierra Pacific Co.*, 350 U.S. 348 (1956).[6]

Dealing specifically with the role of contracts involving wholesale transactions between pipelines and distributors and competition under the Natural Gas Act, this Court stated in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964):

> This is not a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals. In this regulated industry a natural gas company (unless it has excess capacity) must compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them. Those transactions with distributors are few in number. For example, in California there are only two significant wholesale purchasers — Pacific Gas & Electric in the north and the Southern Companies in the south. Once the Commission grants authorization to construct facilities or to transport gas in interstate

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[6] Reference is made to the Petition for Writ of Certiorari filed by Transwestern Pipeline Company in Docket No. 85-1219 for additional authorities applying the *Mobile/Sierra* doctrine.

> commerce, once the distributing contracts are made, a particular market is withdrawn from competition. *The competition then is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use for gas.*

Id. at 659-60 (emphasis in original).

The Commission's action in Order No. 380 is unprecedented. It is of such significance and its lawfulness of such doubt that review by this Court is warranted.

3. The Procedures Followed by the Commission in Abrogating Existing Contracts Do Not Satisfy the Hearing and Substantial Evidence Requirements of the Act Nor the Requirements of Due Process.

Given the right of the pipelines to enter into contractual arrangements with their distributor customers under the Act, it is further well recognized that such contracts can only be abrogated or modified "in circumstances of unequivocal public necessity" in which it is determined, on the basis of substantial evidence, that the agreement involved contravenes the public interest.

> The regulatory system created by the [Natural Gas] Act is premised on contractual agreements voluntarily devised by the regulated companies; *it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.* See *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332.

The Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968) (emphasis supplied). See, also, *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) ("The Commission itself lacks affirmative authority absent extraordinary circumstances 'to abrogate existing contractual arrangements'.").

Texas Eastern's contracts with its customers, like those of other pipeline companies, are valuable property rights. They

define the rights and obligations of the parties and in effect establish the type of service to be provided. Essential provisions of such contracts involving purchase commitments on which Texas Eastern has relied for many years are vitiated on the basis of generalized, unsworn comments in the development of what the Commission refers to as "legislative facts." App. at 273. In view of the decisions of this Court with respect to the integrity of private contractual arrangements under the Act and the findings necessary for their modification, important questions are presented involving the procedures which the Commission must follow prior to abrogating a contact which it has previously approved and on which substantial financial commitments have been made.

Section 5 of the Act permits the Commission to modify contracts "after hearing." Section 19 requires that the Commission's action be based on "substantial evidence." While it has identified the limited circumstances in which the Commission can act, this Court has never squarely addressed the question of the procedures which the Commission must observe prior to abrogating a contract which the Commission has previously approved and on which substantial financial reliance has been placed.[7]

Texas Eastern submits that the bare informal notice and comment procedures of Section 4 of the Administrative Procedure Act are not sufficient to provide due process of law and to fulfill the hearing and substantial evidence requirements of the Act where the issue of contract abrogation is involved.

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[7] This Court upheld the Commission's action in abrogating contracts in *Permian*. The procedures followed there, however, are in stark contrast to the procedures underlying Order No. 380. *See* 390 U.S. at 755 n.4.

The Commission, in justifying its choice of informal rulemaking procedures, states:

> The public interest mandates generic action on this subject and legal precedent clearly establishes the Commission's authority to so act under Section 5. . . . The problem is so pervasive and so significant as to make action on a generic basis far more appropriate, not to mention expedient.

App. at 108.

As precedent, the Commission and the court below relied on this Court's decisions in *United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973), and *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). While affirming the use of rulemaking procedures in *Florida East Coast*, however, this Court noted that a distinction exists between proceedings involving "policy-type rules or standards" and those involving "disputed facts." In *Vermont Yankee* this Court stated that more than simple notice and comment procedures were required "when an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individual grounds, . . .'" 435 U.S. at 542 (citing *Florida East Coast* and *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915)).

Both the Commission and the court below thus erred in interpreting *Florida East Coast* and *Vermont Yankee* as authority for the abrogation of contracts involving wholesale transactions between pipelines and distributors through informal rulemaking proceedings.[8]

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[8] Reliance was also mistakenly placed on Section 403 of the Department of Energy Organization Act, 42 U.S.C. § 7173(c) (1982). App. at 25. Such provision deals strictly with the establishment of rates and cannot reasonably be read to authorize contract abrogation through informal rulemaking.

In this respect, the court below read *Vermont Yankee* as rejecting "with great force and clarity" a principle which the court said it had long held that "procedural requirements deemed inherent in the very concept of fair hearing could be fashioned by the court even though no such requirements have been specified by Congress." App. at 54. Consistent with its interpretation of *Vermont Yankee*, it overruled its decision to the above effect in *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973), together with cases applying the *Mobil* rule. App. at 54.

It is submitted that the view of the court as expressed in *Mobil* was correct, was consistent with the decisions of this Court and essential to the fairness concepts of due process. The correct interpretation and application of this Court's decision in *Vermont Yankee* is of critical importance to the Commission's administration of the Natural Gas Act and, by implication, the Federal Power Act. *Cf. Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981). The operation of contracts involving "individualized arrangements" and their effect on the public interest, including their effect on competition, clearly differs between contracts, parties and specific circumstances and is "case specific." *Cf. Columbia Gas Transmission Corp.* v. *Tennessee Gas Pipeline Co.*, 24 FERC ¶ 61,050 at 61,158 (1983). *Transwestern Pipeline Co.*, 23 FERC ¶ 63,114 at 65,290 (1983).

It is submitted that both the Commission and the court of appeals have misread *Florida East Coast* and *Vermont Yankee* and, consequently, seriously misjudged the procedures required under the circumstances. This Court should therefore assert jurisdiction to address the critical question of first impression of whether informal rulemaking procedures are adequate to fulfill the Commission's obligations to provide due process of law and to meet the Act's hearing and substantial evidence requirements in the situation presented by this case.

4. In Failing To Deal with the Take-or-Pay Provisions in Producer Contracts, Order No. 380 Jeopardizes the Financial Integrity of the Pipelines.

The Commission's action, as the court below recognized, addresses only a part of the problem that the Commission perceived. *See* App. at 37-42. While the Commission addressed minimum bill provisions in contracts between pipelines and their customers, the Commission took no action with respect to the corresponding take-or-pay provisions in contracts between pipelines and their producers. Producer take-or-pay provisions are the practical and legal equivalent of minimum bills. Further, as the court below acknowledged:

> [M]inimum bills enable pipelines to cover their own "take-or-pay" obligation to gas producers. Take-or-pay contracts govern wellhead sales between producers and pipelines. Like minimum bills, under take-or-pay contracts a pipeline must take or, if not take, pay for a minimum amount of gas.

App. at 20.[9]

While implicitly recognizing that producer take-or-pay and pipeline minimum bills were parts of the same issues, the court of appeals nevertheless affirmed on the ground that the Commission had not abused its discretion and "should not be paralyzed by having to decide all relevant issues at the same time." App. at 38; *see also* App. at 39 for the court's summary of the Commission's rationale. Order No. 380 thus places pipelines in a contractual vise. They remain subject to claims under the take-or-pay and minimum take provisions of their producer contracts but have no enforceable rights to collect commensurate sums or sell minimum volumes under the distributor contracts on which

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[9] It is difficult to reconcile this clearly correct statement with the court's subsequent acceptance of the Commission's rationale that there was "no clear nexus" between the take-or-pay provisions in producer contracts and the minimum bill provisions in distributor contracts, and further that minimum bills were not designed "to provide protection against take-or-pay liability." App. at 38, 39.

they have relied. The exposure to the pipelines as a result of the Commission's action is substantial. Whether the Commission acted arbitrarily or rationally in dissolving only one link in the chain of contractual commitments is a matter affecting virtually all pipelines and the industry in general and is further reason for review by this Court.

CONCLUSION

This Court should issue a writ of certiorari to review the decision of the court below.

Respectfully submitted,

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